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June 20, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-B204
Washington, D.C. 20554

Re: *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's April 27, 2001 Further Notice of Proposed Rulemaking are an original, and four paper copies, of the Comments of Focal Communications Corporation and US LEC Corp.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION AND US LEC CORP.

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SUMMARY

The Commission has attempted to craft a bright line rule addressing CLEC interstate access charges. The Commission has determined that CLEC access rates below a certain benchmark rate will be deemed to be just and reasonable. With this action, the Commission has eliminated the need for further regulation of CLEC access charges, and, in particular, AT&T's proposal that CLECs be required to charge the ILEC rate for 8YY traffic immediately.

AT&T's concern over CLEC 8YY access rates is its belief that CLECs can charge excessive access rates for 8YY traffic and share the revenues with high generators of such traffic. The new benchmark rules governing CLEC tariffing of access charges generally will conclusively limit a CLEC's ability to impose unreasonable charges on 8YY traffic. This should end the Commission's inquiry on this point as there is no need for further regulation on this issue, and the Commission's enforcement mechanisms are more than adequate to address any lingering aspects of the "problem" that may remain.

It is also unclear that there is any "problem" at all. AT&T has failed to demonstrate any link between incentive payments paid to customers and the magnitude of access charges it pays or the level of access traffic generated. In fact, rather than being a "problem," incentive payments are commonplace in markets characterized by some degree of competition. AT&T, and other IXCs, were instrumental players in creating the framework of aggregating traffic and paying commissions to customers as ways of developing and securing competitive positions. Thus, what AT&T complains that CLECs are doing is derivative of its own standard industry practice to attract large customers. These inducements are vital to a carrier's ability to compete particularly when the carrier is seeking to win the customer over from the incumbent provider. These inducements are not market distortions but rather are reflections of the reality of the

marketplace and the difficulties faced by new competitive entrants seeking to gain a presence in the market. The Commission not only has recognized the existence of such incentive payments, but often recognized their value in promoting competition.

Imposing further regulation on CLEC access charges would also run counter to many of the goals the Commission articulated in the CLEC access charge proceeding. Such regulation would not be economically rational or reflect the way in which costs are incurred as there is no cost or operational basis to support a lower charge for 8YY traffic as opposed to other types of access service. The Commission would also lose the administrative simplicity it gained in crafting a bright line rule that applied to all CLEC access traffic. Most importantly, requiring CLECs to charge immediately the ILEC rate for 8YY traffic would undermine the transitional approach that the Commission found vital to prevent dislocation for CLECs by giving them time to adjust their business plans.

Thus, the Commission should defer to the regulatory framework it has just established to address the issue of CLEC access charges for 8YY traffic. The framework is more than sufficient to address any problems that may arise in regard to such traffic.

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COMMENTS OF FOCAL COMMUNICATIONS CORPORATION AND US LEC CORP.

Focal Communications Corporation ("Focal") and US LEC Corp. ("US LEC") ("Commenters") submit these comments in response to the Commission's Further Notice of Proposed Rulemaking concerning access charges for 8YY toll-free traffic originated by competitive local exchange carriers ("CLECs").[1]

Focal is a facilities-based provider of data and voice communications services, serving primarily traffic-intensive users of local services, value-added resellers, and Internet service providers in major markets nationwide. US LEC is a facilities-based provider of local, long distance, data, Internet and enhanced services serving customers in the southeastern and Mid-Atlantic sections of the United States. Commenters provide competitive local exchange services to customers and exchange access services to interexchange carriers ("IXCs") that provide long distance services to certain of Commenters' local exchange service customers. Commenters have committed significant resources to deploy state-of-the-art networks that facilitate both the provisioning of local telecommunications service and exchange access services.

[1] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*").

I. THE NEW BENCHMARK RULES ALREADY ADEQUATELY ADDRESS AT&T'S CONCERNS

In the *CLEC Access Charge Order*, the Commission established "a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable."[2] AT&T will undoubtedly urge again an exception for 8YY traffic even though the ink has barely dried on the Commission's rule. AT&T previously urged the Commission to implement this exception, with no basis in the record, in an *ex parte* filing less than one month before the Commission issued its order.[3] Under this proposed exception, CLEC access charges for originating 8YY traffic would be priced at the corresponding ILEC rate immediately without any transition period.[4]

AT&T's concern is that CLECs "aggregate" 8YY traffic from customers such as hotels, universities, and office campuses, "charge extremely high prices for switched access services associated with such traffic," and then share the revenues with the customers generating the traffic.[5] However, the new rules governing tariffing of CLEC access charges will conclusively limit a CLEC's ability to impose unreasonable access charges on 8YY traffic. The benchmark applies to all switched access traffic including toll-free, 8YY traffic.[6] Thus, unless the parties contract otherwise, CLECs will not be able to charge more than 2.5 cents per minute. In a year, the benchmark will drop to 1.8 cents per minute; in two years, it will drop to 1.2 cents per

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2 *Id.* at ¶ 4.

3 *Access Charge Reform*, CC Docket No. 96-262; *Request for Emergency Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance*, DA 00-1067; *Mandatory Detariffing of CLEC Interstate Access Services*, DA 00-1268, AT&T Notice of *Ex Parte* Presentation (March 29, 2001) ("*AT&T Ex Parte*")

4 *Id.* at p. 2.

5 *Id.*

6 *CLEC Access Charge Order* at ¶ 24.

minute; after three years, it drops to the corresponding ILEC rate.[7] Thus, the limits become more stringent every year.

Equally important, the Commission has determined that at or below this benchmark level, CLEC access charge rates "will be conclusively presumed to be just and reasonable."[8] Thus, there will be no possibility of CLECs charging high rates for 8YY traffic because they will be charging a rate that the Commission determined is just and reasonable. Accordingly, even assuming that provision of 8YY access service by CLECs was otherwise problematic, which it is not for all the reasons discussed herein, the new rules already adequately address AT&T's concern. For this reason alone, the Commission does not need to adopt any special rules governing provision of 8YY access service by CLECs.

II. AT&T HAS FAILED TO DEMONSTRATE ANY SIGNIFICANT "PROBLEM"

The Commission was right to note the "paucity of record evidence" on the alleged "problem" of provision of 8YY access service by CLECs.[9] The Commenters' experience, if it is indicative of other CLECs, suggests that there is not much of an issue at all.[10]

In particular, AT&T has failed to demonstrate any link between the incentive payments it is concerned about and the magnitude of access charges it pays. For the majority of 8YY customers, calling patterns are not significantly affected by incentives. The end users at hotels,

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7 *Id.* at ¶ 52.

8 *Id.* at ¶ 40.

9 *CLEC Access Charge Order* at ¶ 99.

10 Focal noted in an *ex parte* filing in response to AT&T's 8YY request that:

> Focal handles more non-8YY access traffic than 8YY traffic, and its access rates for the two are identical. Focal has discontinued commission payments for new customers, and even if commission payments for existing customers were factored into its access rates, its access rates would still be substantially lower than the 4.27 cents per minute CLEC average. In a recently completed negotiation with one of the large IXCs, no special treatment was required for 8YY traffic. Thus, there is no basis for application of any special regulation of 8YY traffic with respect to Focal.

universities or other similar institutions who make calls are not directly affected by incentives offered by CLECs. AT&T has not shown that the calling patterns of these individuals will be affected by the commission or incentive payments to the institution.[11] The commission payments are more a factor in getting the institution to choose the CLEC as a service provider as opposed to influencing calling volume.[12] Thus, AT&T has failed to demonstrate that there is a correlation between incentive payments to these large customers and artificially-inflated levels of access traffic which is the "problem" it asks this Commission to address.

AT&T contends that 30% of its CLEC access traffic is generated by 8YY aggregators that it "speculates" may have revenue-sharing arrangements with their end users.[13] Even if we take this unsubstantiated, speculative figure at face value, it proves nothing. CLECs seek to sign up customers who are intensive users of 8YY service because they are desirable customers generally. These customers will remain intensive users of 8YY service regardless of who is the provider. In reality, AT&T merely seeks to use CLEC incentive payments as an excuse for reducing CLEC access charges lower than what the Commission has already determined is appropriate under the benchmark.

In addition, if there are any situations where there is any abuse, such as the incident of 800,000 8YY calls being sequentially dialed by a single end user mentioned in the FNPRM,[14] these situations can be addressed through the complaint process. There is no need for the Commission to alter its compensation framework for CLEC access charges to address a problem

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Access Charge Reform, Request for Emergency Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance, Mandatory Detariffing of CLEC Interstate Access Services, CC Docket No. 96-262, DA 00-1067, and DA 00-1268, Notice of *Ex Parte* Presentation at 4 (April 9, 2001).

11 *See, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Report and Order, FCC 97-371, ¶ 62, n. 167 (1997).

12 *See, Id.* at ¶ 62.

13 *CLEC Access Charge Order* at ¶ 100.

14 *CLEC Access Charge Order* at ¶ 99.

that AT&T has failed to demonstrate actually exists, much less that it is a substantial problem. Accordingly, the Commission should conclude that AT&T has failed to identify any "problem" that warrants special rules for 8YY traffic.

III. INCENTIVE PAYMENTS ARE A NECESSARY, STANDARD PRACTICE IN COMPETITIVE TELECOMMUNICATIONS MARKETS

The situation that AT&T laments, *i.e.*, the purported revenue sharing arrangements with lucrative customers, is commonplace in all markets characterized by some degree of competition. In fact, ironically, it is a situation that AT&T played a large part in creating. As noted in the definition of "aggregator" in the Newton's Telecom Dictionary:

> Aggregators are companies which buy long distance wholesale and sell it retail. Aggregators exist because AT&T decided it wanted to win back long distance business it had lost. AT&T sliced its rates, liberalized its bulk billing rules, and encouraged those consultants who had recommended their clients switch to MCI and Sprint to become aggregators. These consultant-turned-aggregators simply solicit anyone's long distance business and add it to their collection. AT&T sends their end-user a bill and the consultant-turned-aggregator a commission check.[15]

Thus, what AT&T alleges CLECs are doing is simply a derivative of this standard industry practice to attract large customers.

Large generators of traffic, such as hospitals, universities, and office campuses, are desirable customers because they generate a significant amount of traffic in addition to 8YY traffic. There is significant competition for such customers not only between CLECs, but also the ILEC who will seek to retain these customers. As part of a competitive pricing package, carriers offer inducements for non-8YY access traffic via contract pricing, or via reductions in the total price of bundled access/local service. Incentive payments for 8YY traffic are simply another type of inducement offered to obtain the customer and are no different in essential respects to discounts that carriers provide generally to customers for a range of services. These

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[15] Newton's Telecom Dictionary 45 (16th Ed. 2000) *quoting* Teleconnect Magazine.

inducements are vital to a carriers' ability to compete in that it allows the carrier to differentiate its products and services to make them more attractive to the potential customer.

These incentive payments are particularly important for new market entrants since they must induce customers to switch from the incumbent provider. The Commission has recognized the importance of these large customers to the development of competition. As the Commission noted:

> An incumbent can forestall the entry of potential competitors by "locking up" large customers by offering them volume and term discounts at or below cost. Specifically, large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers. To the extent the incumbent can lock in the larger business customers whose traffic would economically justify the construction of new facilities, the incumbent can foreclose competition for the smaller customers as well.[16]

If the competitor is able to secure these large customers it will not only promote competition but lead to the deployment of more facilities by the CLEC. As explained above, AT&T has not shown that these incentives produce any significant additional access charge liability to IXCs. Accordingly, these inducements merely reflect marketplace reality and the difficulties faced by CLECs in entering new markets and are justified as such.

Again, the use of incentive payments or commissions is quite prevalent in the telecommunications industry particularly in regard to services provided to hotels, hospitals, and educational institutions.[17] For instance, operator service providers,[18] who are chosen by the

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16 *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, and CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, at ¶ 79 (August 27, 1999)("*Pricing Flexibility Order*")

17 *See, In the Matter of Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators,* CC Docket No. 94-158, Second Report and Order, FCC 99-171, ¶ 2 (1999). As early as 1988, AT&T sought to introduce a switched network offering designed to attract users such as hotels, hospitals, universities, and other traffic aggregators who had high volumes of both 1+ and 0+ calling. Under the plan, for those customers who

premises' owner, will pay commissions to the premises owner on certain calls in exchange for being chosen as the "presubscribed" interexchange carrier ("PIC") serving the phones.[19] With payphones, similar commission arrangements are utilized, including by AT&T.[20] IXCs provide commissions to private payphone owners and non-RBOC payphone owners for 0+ calls.[21] AT&T paid commissions to payphone owners who presubscribed their payphones to AT&T's interexchange service.[22] The Commission had initially concluded that it would not need to establish per-call compensation for 0+ calls because of the compensation payphone owners received through the commissions.[23] Incentive payments have led to the development of competition in the payphone industry. In 1996, there were 1.5 million LEC payphones and 350,000 payphones provided by competitive payphone providers.[24]

Moreover, the Commission has recognized the value of incentives in promoting competition. For instance, the Commission has allowed IXCs to depart from geographic rate averaging requirements to the extent necessary to offer contract tariffs, Tariff 12 offerings,

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have at least 4 million minutes of 1+ and 0+ traffic, they would get a rate of 18 cents per minute for 1+ calls, and a payment ranging of 5 cents to 30 cents for each 0+ call made from their premises. AT&T withdrew this offering, however, because of Commission concerns that the terms of the rebate may violate Section 203(c). *In the Matter of AT&T Communications Tariff No. 1 Hospitality Network Service,* CC Docket No. 88-105, Order Designating Issues for Investigation, 3 FCC Rcd. 1465 (1988).

18 Operator service providers are carriers that provide operator-assisted long distance service. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Notice of Proposed Rulemaking, FCC 96-254, ¶ 9 (1996) ("*Payphone NPRM*").

19 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Second Report and Order, FCC 97-231, ¶ 62, fn. 167 (1997)(Citing remarks of one commenter that "location owners demand and receive commissions on every form of revenue . . . .").

20 *Payphone NPRM* at ¶ 7.

21 *Id.* at ¶ 16.

22 *United Artists Payphone Corporation v. New York Telephone Company, et al.*, File Nos. E-90-181, E-90-182, Memorandum Opinion and Order, FCC 93-387, ¶ 10 (1993).

23 *Payphone NPRM*, ¶ 16.

24 *Payphone NPRM* at ¶ 6.

optional calling plans, temporary promotions, and private line services.[25] As the Commission observed:

> promotions, optional calling plans, and discounts facilitate introduction of new and beneficial services to consumers. Indeed, we are particularly concerned that carriers will cease to offer such service offerings, to the clear detriment of all consumers, unless carriers are permitted to offer them for a limited time on a narrower scale than throughout their entire service areas. We believe that the limited scope and nature of promotions offered on a geographically specific basis will protect consumers and that, to the extent that these service offerings promote new services, consumers will benefit, including rural customers. We also believe that it is not necessary to apply geographic averaging to private line services, contract tariffs, and Tariff 12 offerings to protect residential consumers because these services are normally provided to businesses. Business consumers benefit from these services because in many cases the services are provided at discounted rates.[26]

The Commission recognized the value in the ability of carriers to offers these services as ways to spur or respond to competition.[27]

Therefore, contrary to AT&T's view, the Commission should find that incentives for 8YY traffic are a useful and necessary tool for new market entrants that promote competition. Likewise, as mentioned above, CLECs through use of incentives, will be able to obtain larger customers than can help support the development of its business. Thus, far from being a problem, incentive payments can provide a valuable tool to aid the development of viable competition.

IV. ACCESS FOR 8YY TRAFFIC HAS THE SAME COST STRUCTURE AND OPERATIONAL CHARACTERISTICS AS OTHER ACCESS TRAFFIC

Apart from the fact that the benchmark scheme adopted by the Commission already addresses AT&T's concerns, there is no basis for crafting a separate exception for 8YY traffic since providing access service for this traffic has the same cost structure and operational

[25] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, FCC 96-61, ¶ 24 (1996).
[26] *Id.* at ¶ 25.
[27] *Id.* at ¶ 26.

characteristics as other access traffic. The Commission correctly noted that "a CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY access service, or terminating or originating access service for conventional 1+ calls."[28] The Commission has observed that switched access service typically involves:

> (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence.[29]

An 8YY call will travel the same path and utilize the same facilities as a conventional 1+ call. There is no operational basis for distinguishing 8YY calls. The Commission does not require that ILECs charge a different access charge rate for 8YY traffic as opposed to conventional 1+ traffic. The Commission only requires that ILEC originating 8YY minutes should be treated as termination access service.[30]

Thus, there is no cost or operational basis for crafting a different regulatory treatment for 8YY calls. In fact it would run counter to what the Commission is seeking to do in regard to CLEC access charges. The Commission noted that "[i]n recent years, the Commission has repeatedly examined access rates, attempting to make them more economically rational."[31] Requiring a different benchmark rate for 8YY traffic would not be economically rational as such a rate would have no operational or cost basis. It would also not align "access rate structures more closely with the manner in which costs are incurred"[32] as it would unduly limit CLEC cost recovery for calls that impose the same costs on the CLEC network as other types of calls. It

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28 *CLEC Access Charge Order* at ¶ 104.
29 *Id.* at ¶ 55.
30 *Pricing Flexibility Order* at ¶ 237.
31 *CLEC Access Charge Order* at ¶ 8.
32 *Id.*

would also eliminate the administrative simplicity provided by a bright line rule.[33] For instance, in crafting the rural exemption, the Commission chose an approach that would not rely on a "subscriber-by-subscriber" approach, or "require extensive calculation or analysis by either carriers or this Commission."[34] A different benchmark for 8YY traffic would require CLECs to disaggregate their traffic by type of traffic to separate out 8YY traffic. Thus, far from administrative simplicity, CLECs would incur additional costs to apply separate charges to 8YY traffic.

V. A TRANSITION IS NECESSARY FOR 8YY ACCESS CHARGES

For the same reasons the Commission declined to move CLEC access charges generally to the ILEC rate immediately, it should also decline to do so for 8YY access charges. The Commission has stated that it is "reluctant to flash-cut CLEC access rates to the level of the competing ILEC" as a "more gradual transition period is appropriate so that the affected carriers will have the opportunity to adjust their business models."[35] The Commission recognized that such an approach is particularly appropriate given the fact "the Commission has twice ruled, in essence that a CLEC's rate is not *per se* unreasonable merely because it exceeds the ILEC rate."[36] This transitional period is deemed vital to avoid "too great of a dislocation in the CLEC segment of the industry" and allow CLECs time to obtain "alternative sources for the substantial revenues of which the benchmark will deprive them."[37]

While Commenters are not familiar with the incentive payment plans of all CLECs, it is highly likely that CLECs will experience dislocation and even continuing liability for incentive payments even if 8YY access rates are reduced to the ILEC rate. Moreover, as explained in these

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33 *Id.* at ¶¶ 41, 75.
34 *Id.* at ¶ 75.
35 *CLEC Access Charge Order* at ¶ 37.
36 *Id.*

comments, CLECs have the same costs in providing 8YY access service as access service generally. Thus, immediately reducing CLEC 8YY access charges to the ILEC rate could cause CLECs to recover less than the benchmark rate.[38] Accordingly, the Commission should afford CLECs an opportunity to transition 8YY access charges to the ILEC rate consistent with the overall benchmark scheme.

VI. CONCLUSION

The Commission has recognized that a crucial goal in regard to its setting of parameters for access charges is to avoid "disrupting the development of competition in the local telecommunications market currently taking root."[39] To achieve this end, the Commission should be guided by the following bedrock principle previously enunciated in this proceeding:

> [w]e strongly prefer not to intervene in the marketplace, particularly with respect to competitive new entrants, unless intervention is necessary to fulfill our statutory obligation to ensure just and reasonable rates. If market forces are not operating to constrain CLEC access charges, we seek the least intrusive means possible to correct any market failures.[40]

The Commission has already established a benchmark framework that it deems will establish just and reasonable CLEC access charge rates. There is no need for further action, particularly if there is no evidence of market distortion or market failures. The danger of the Commission taking action that is not necessitated by conditions in the market is to imperil the

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37 *Id.* at ¶ 62.

38 The FCC does not have the authority to cancel existing contractual obligations with customers although it can ban this practice prospectively for new contracts. *See, e.g., In the Matter of US West Communications, Inc. and Eagle Telecommunications, Inc.*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 4644, ¶¶ 17-18 (1997); *Motion Picture Assn. of America, Inc. v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992). Therefore, the FCC will not be able to mitigate harm to CLECs caused by their obligations under existing contracts.

39 *CLEC Access Charge Order.* at ¶ 6.

40 *Pricing Flexibility Order* at ¶ 256.

already precarious state of competition in the local service market. There is no need to impose a more stringent benchmark for CLEC access rates for 8YY traffic.

Respectfully submitted,

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Dated: June 20, 2001

CERTIFICATE OF SERVICE

I, Harisha J. Bastiampillai do hereby certify that on this 20th day of June, 2001 the foregoing Comments of Focal Communications Corporation and US LEC Corp. was delivered by hand and first class mail to the following:

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Instructions for filing Comments in CLEC Access Charge Proceeding

- Client number is 14522.0001 and 14643.0002.
- Original, four copies, stamp and return copy, hand-delivered to Secretary of the FCC, Magalie Roman Salas
- Have copies sent via courier or first class mail as indicated on Certificate of Service.
- Send a copy to:

  Clients (I will provide the address)
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Thanks.